

**IN THE  
SUPREME COURT  
STATE OF MISSOURI**

---

**No. 85513**

---

**EMERSON ELECTRIC COMPANY,  
Appellant,**

**v.**

**DIRECTOR OF REVENUE, STATE OF MISSOURI,  
Respondent.**

---

**ON PETITION FOR REVIEW  
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION  
THE HONORABLE KAREN A. WINN, COMMISSIONER**

---

**REPLY BRIEF FOR APPELLANT**

---

**BRYAN CAVE LLP**

**Juan D. Keller, #19864  
B. Derek Rose, # 44447  
One Metropolitan Square  
211 N. Broadway, Suite 3600  
St. Louis, MO 63101  
Telephone: (314) 259-2000  
Facsimile: (314) 259-2020**

**Edward F. Downey, #28866  
221 Bolivar Street, Suite 101  
Jefferson City, MO 65101  
Telephone: (573) 556-6622  
Facsimile: (573) 556-6630**

**Attorneys for Appellant**

## **TABLE OF CONTENTS**

ARGUMENT.....	5
A. Introduction .....	5
B. The Plain Language of Section 144.030.2(20) Does Not Contain the Additional Element Supplied by the Commission and the Director.....	6
C. Even If The Statute Is Ambiguous, Emerson is Within the Purpose of the Statute.....	12
CONCLUSION .....	14
CERTIFICATE OF SERVICE .....	15
CERTIFICATE OF COMPLIANCE .....	15

## **TABLE OF AUTHORITIES**

### **Missouri Cases**

<i>Civil Service Commission of City of St. Louis v. Board of Aldermen of City of St. Louis,</i>	
92 S.W.3d 785 (Mo. banc 2003) .....	10
<i>Estate of Thomas,</i>	
743 S.W.2d 74 (Mo. banc 1988) .....	7, 10
<i>International Business Machines Corporation v. Director of Revenue,</i>	
958 S.W.2d 554 (Mo. banc 1997) .....	6, 13
<i>Iron County v. State Tax Commission,</i>	
437 S.W.2d 665 (Mo. banc 1963) .....	13
<i>Lincoln Industrial, Inc. v. Director of Revenue,</i>	
51 S.W.3d 462 (Mo. banc 2001) .....	7

### **Missouri Statutes**

Section 144.030.2(3), RSMo 1994 .....	8, 9, 10
Section 144.030.2(10), RSMo 1994 .....	9, 10
Section 144.030.2(11), RSMo 1994 .....	8, 10
Section 144.030.2(20), RSMo 1994 .....	5 - 13
Section 144.605(4), RSMo 1994 .....	8
Section 144.619.2, RSMo 1994 .....	8
Section 149.045, RSMo 1994 .....	11
Section 196.060, RSMo 1994 .....	11

Section 196.825, RSMo 1994 .....	11
Section 252.090.1, RSMo 1994.....	11
Section 390.020, RSMo 1994 .....	11
Section 390.020(6), RSMo 1994.....	8, 10, 11
Section 390.020(22), RSMo 1994.....	9
Section 537.250, RSMo 1994 .....	11
Section 621.189, RSMo 1994 .....	5
Section 621.193, RSMo 1994 .....	5

## ARGUMENT

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE REFUND CLAIM BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT, CONTRARY TO THE COMMISSION’S CONCLUSION, SECTION 144.030.2(20) IMPOSES NO REQUIREMENT FOR EXEMPTION THAT A COMMON CARRIER USE THE PURCHASED AIRCRAFT FOR COMMON CARRIAGE.**

### **A. Introduction**

Section 144.030.2(20),<sup>1</sup> the exemption at issue in this appeal, contains two requirements for Emerson’s purchase of the Aircraft to qualify for exemption: (1) Emerson must be a common carrier; and (2) the Aircraft must be stored in Missouri or used in interstate commerce. The Director has conceded that a part of Emerson’s operations, carried out through the Emerson Transportation Division, are those of a common carrier (Dir. Br. 14) (“Emerson’s transportation division is, of course, a common carrier”). Likewise, the Director concedes that the Aircraft is used in interstate commerce (“nor is there any question that the [A]ircraft was for ‘use in interstate commerce’ ”) (Dir. Br. 6). Therefore, even the Director concedes that Emerson, through its transportation division, satisfies both elements of the exemption. This Court could reverse the Commission based solely on these admissions.

---

<sup>1</sup> All statutory references are to the Revised Statutes of Missouri of 1994, as amended, unless otherwise noted.

The Director nonetheless seeks to deny the exemption to Emerson notwithstanding the clear language of the statute and the Director's admissions. The Director seeks to defeat the application of the sales/use tax exemption to Emerson by inviting this Court to add words to Section 144.030.2(20). To support that invitation, the Director makes the unsupported assumption that Section 144.030.2(20) is ambiguous. Accordingly, and under the guise of statutory construction, the Director rewrites the exemption so that it furthers what the Director believes the tax policy should be in Missouri. The Director's position is unsupported by Missouri law and must be rejected by this Court.

**B. The Plain Language of Section 144.030.2(20) Does Not Contain the Additional Element Supplied by the Commission and the Director**

Emerson previously noted (App. Br. 13) that this Court has cautioned against judicial revision of the law under the guise of statutory construction. Yet that is precisely what the Director urges and the Commission has done. They have determined what they believe should be the appropriate tax policy and proffer arguments in support of their proposed policy. The Director then solicits this Court to “construe” the statute as she would have it written.

The Director's and the Commission's position in this case is inconsistent with existing opinions of this Court. *See International Business Machines Corporation v. Director of Revenue*, 958 S.W.2d 554, 558 (Mo. banc 1997) (“*IBM*”) (“Sales tax is purely a matter of statute and within the power of the legislature, subject to constitutional limitations. This Court has no authority to amend the sales tax laws” (citations omitted)); *Estate of Thomas*, 743 S.W.2d 74, 76 (Mo. banc 1988) (“when the language of the statute

is unambiguous and conveys a plain and definite meaning, ‘the courts have no business foraging among such rules [of construction] to look for or impose another meaning.’ ”). The Director’s brief does not address these authorities, likely because they refute her argument.

Without directly asserting any ambiguity in Section 144.030.2(20), the Director solicits this Court to give the exemption a “strict construction” against Emerson (Dir. Br. 6). The Director suggests that this Court judicially impose additional requirements for exemption under Section 144.030.2(20). Emerson understands that where there is doubt or ambiguity on the meaning of an exemption, it will be construed strictly against the taxpayer. *Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W.3d 462, 465 (Mo. banc 2001). However, that rule of statutory construction was never intended as a license for this Court to rewrite the terms of a statute that is clear and unambiguous on its face if the Court does not agree with the tax policy embodied in the words of the statute.

The Director’s primary argument is that Emerson is not a common carrier for purposes of Section 144.030.2(20) because Emerson’s transportation division activities do not apply to Emerson “in its entirety” and because Emerson does not use the Aircraft in its common carriage business (Dir. Br. 11). The Director has identified no words in Section 144.030.2(20) that evidence an intent to require the taxpayer be a common carrier “in its entirety” or to require the Aircraft’s use in common carriage. Section 144.030.2(20) is unambiguous and it should be applied as written. Section 144.030.2(20) does not require that the purchaser engage in common carriage “in its entirety” to qualify as a common carrier. Nor does Section 144.030.2(20) require that the Aircraft be used in common

carriage. Because the statute is unambiguous, this Court need not even consider or analyze the arguments the Director advances for reading words into the exemption. Nevertheless, none of the Director's arguments has merit.

First, contrary to the Director's position, Emerson's transportation division's activities do qualify the Emerson legal entity as a common carrier. The Director freely admits that Emerson, through its transportation division, engages in common carriage. (Dir. Br. 14). Yet the Director disputes that Emerson is a common carrier within the meaning of Section 144.030.2(20). Emerson and the transportation division are not separate entities as the Director implies. The Commission expressly found that they are the same legal entity (FF 6, Appendix A-2). It is Emerson, and not an unincorporated arm of Emerson, that the state has certified as a Registered Property Carrier, a form of common carrier. It is Emerson, and not an unincorporated arm of Emerson that the Director approved as a common carrier for purposes of Sections 144.030.2(3) and (11). These are undisputed facts that the Commission found (FF 9, Appendix A-3). Section 144.619.2 imposes the Missouri use tax on "person[s]." Section 144.605(4) defines "person." The definition includes corporations but does not include divisions. Likewise, the definition of common carrier in Section 390.020(6) applies to "person[s]." Section 390.020(22) defines "person" to include corporations, but does not include divisions. Emerson, and not its transportation division, is the "person" under Missouri law, and is both the taxpayer and the common carrier. Therefore, Emerson is entitled to the exemption on its purchase of the Aircraft.



Other sections of the sales tax exemption statute refute the Director's position that the Aircraft must be used in Emerson's common carriage business. Section 144.030.2(3) exempts materials, replacement parts and equipment used in repair, maintenance or manufacture of "aircraft ***engaged as*** common carriers of persons or property."<sup>2</sup> Section 144.030.2(10) conditions the exemption of purchases of pumping equipment by common carriers to equipment that propels products through "pipelines ***engaged as*** common carriers." Each of these exemptions expressly requires that the exempt item be used in common carriage. Therefore, the General Assembly knows how to limit an exemption, when it intends to do so, to property engaged in common carriage. The fact that the General Assembly did not expressly require a common carriage use in Section 144.030.2(20) means that it did not intend that requirement.

The Director argues that, at least for Section 144.030.2(20), any exempt purchase by a common carrier must be used in common carriage. If that is true, then the common carriage use requirements that the Director notes in Section 144.030.2(3), and Emerson noted in Section 144.030.2(10), are idle verbiage. The Director's argument thus flies in the face of one key rule of statutory construction—the General Assembly will not be assumed to "insert idle verbiage or superfluous language in a statute." *See Civil Service Commission of City of St. Louis v. Board of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003). The fact that the Director, as a matter of tax policy, prefers that the General Assembly had added language to Section 144.030.2(20) is irrelevant.

---

<sup>2</sup> Emphasis added here and throughout unless otherwise noted.

Similarly, Section 144.030.2(11) exempts railroad rolling stock for use in transporting persons or property in interstate commerce, and exempts motor vehicles (of a certain weight) and trailers used by common carriers solely in the transportation of persons or property in interstate commerce. That exemption, however, does not require that the railroad be a common carrier or use the rolling stock in common carriage. Nor does that exemption require that motor vehicles or trailers be used in common carriage. Section 144.030.2(11) highlights the simple fact that the Missouri General Assembly imposes different qualifications for different exemptions. In conclusion, Sections 144.030.2(3), (10), and (11) evidence that the lack of a common carriage use requirement in the words of Section 144.030.2(20) was not mere oversight.<sup>3</sup>

The Director, consistent with her disregard of the actual language of Section 144.030.2(20), ignores specific language in Section 390.020(6) in arguing that Emerson is not a common carrier for purposes of the exemption at issue. The Director notes that there are two separate categories of common carriers set forth in Section 390.020(6): (a) “any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire ...;” and (b) “airlines engaged in intrastate commerce” (Dir. Br. 10). The Director notes, correctly, that Emerson is not an airline engaged in intra- or interstate commerce (Dir. Br. 10). But Emerson is a common carrier

---

<sup>3</sup> Absent an ambiguity in Section 144.030.2(20), this Court is obligated to apply the exemption as written, whether or not this Court is of the opinion that the lack of a common carriage use requirement was an oversight. *See Estate of Thomas*, 743 S.W.2d 74, 76 (Mo. banc 1988).

under the first category of Section 390.020(6) and the Director does not deny it. Thus, Emerson is a common carrier under Section 390.020(6).

The Director attempts to misdirect this Court's focus from the express language of Section 144.030.2(20) by citing numerous other statutes and dictionary definitions of "common carrier." These attempts are unavailing. The Director first implies (Dir. Br. 9-11) that Emerson would not seek the application to itself of Missouri statutes, as written, with respect to the definition of "common carrier." A review of these statutes demonstrates that this claim is false. *See, e.g.*, Section 149.045 (requiring "common carriers *transporting cigarettes*" to complete forms for the Director); Section 196.060 (requiring common carriers to report movement of food, drugs, devices or cosmetics to State officials); Section 252.090.1 (requiring common carriers to submit to inspections where Department of Conservation has reason to believe that warehouses contain unlawfully transported wildlife); Section 196.825 (requiring common carriers delivering milk, cream or ice cream to recover cans and bottles within 24 hours); Section 537.250 (stating that common carriers are liable for damage when property is damaged during common carriage). All of these statutes apply to Emerson; nothing in this record supports the Director's claim that Emerson has attempted to avoid application of these statutes. The Director's insinuations to the contrary are simply unsupported by any facts.

The Director also cites dictionary definitions of "common carrier," and concludes that "[n]othing in either definition suggests that a common carrier could be some broader organization of which the carrier is only a small part" (Dir. Br. 7-8). More importantly, the converse is also true, nothing in any of the Director's definitions suggests that a common

carrier must engage *solely and exclusively* in common carriage to be a common carrier.

Under the Director's logic, an entity that operates a bowling alley and a restaurant would not be considered either a bowling alley operator or a restaurateur because the entity does not engage in either aspect of the business solely or exclusively. The Director's construction of "common carrier" makes no sense. In short, the Director's attempts to avoid the plain language of Section 144.030.2(20) are unavailing, and this Court should reverse the Commission's decision.

**C. Even If The Statute Is Ambiguous, Emerson is Within the Purpose of the Statute**

The linchpin of the Director's argument against the exemption is that ambiguous exemption statutes are strictly construed against taxpayers. There are two problems with this argument. First, as noted above, Section 144.030.2(20) is not ambiguous. The Director merely assumes that the exemption is ambiguous because she disagrees with the result commanded by the clear language used by the General Assembly.

Furthermore, even if the statute were ambiguous (which it is not), it is not true that Emerson's status as a taxpayer defeats its claim. Ambiguous exemption statutes are construed strictly, *but reasonably*, against the taxpayer. *Iron County v. State Tax Commission*, 437 S.W.2d 665, 668 (Mo. banc 1963). The Director has not proffered one reasonable basis for this Court to construe Section 144.030.2(20) against Emerson. Indeed, Emerson demonstrated that the basis cited by the Commission (*i.e.*, that the encouragement of the production of goods and services subject to Missouri sales tax is the purpose of the exemption) was incorrect because the transportation of property is not

subject to Missouri sales or use tax (App. Br. 14-15). The Director does not even attempt to refute this fact.

As previously noted (App. Br. 15), this Court held in *IBM*, 958 S.W.2d at 558, that “[a]n equally important object [of exemption statutes] is the furtherance of industrial development in the state, regardless of whether the products involved might become subject to the Missouri sales tax.” As Emerson noted earlier, the express language of Section 144.030.2(20) satisfied the purpose of encouraging common carriers to locate their businesses, or to store their aircraft, in Missouri (App. Br. 15). The Director does not dispute this fact; she merely states, without any authority whatsoever, that providing the exemption to Emerson would “gut” the presumption that exemptions are construed against the taxpayer because every business would be entitled to an exemption (Dir. Br. 14). Of course, this is not so. Emerson simply asks this Court to construe (if the Court were to find ambiguity in the statute) Section 144.030.2(20) in light of the General Assembly’s express purpose to exempt “*all*” purchases of aircraft *by common carriers* where the aircraft is *stored or used in interstate commerce*.

### **CONCLUSION**

For all of the foregoing reasons, Emerson is entitled to a refund of tax remitted on its purchase of the Aircraft. This Court should reverse the Commission with instructions to enter a decision granting the Refund Claim.

Respectfully Submitted,

BRYAN CAVE LLP

---

Juan D. Keller, #19864  
B. Derek Rose, #44447  
One Metropolitan Square  
211 North Broadway, Suite 3600  
St. Louis, Missouri 63102  
Telephone: (314) 259-2000  
Facsimile: (314) 259-2020

Edward F. Downey, #28866  
221 Bolivar Street, Suite 101  
Jefferson City, MO 65101  
Telephone: (573) 556-6622  
Facsimile: (573) 556-6630

Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this \_\_\_ day of January, 2004, to Jim Layton, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

---

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06, and that the foregoing brief contains 2,768 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief filed with this Court has been scanned for viruses and is virus-free.

---